Central Law Journal

St. Louis, July 5, 1926

VALIDITY OF STATUTE PROHIBITING DISCHARGE OF EMPLOYE FOR MEMBERSHIP IN TRADE UNION

In Martin on Labor Unions, Section 27, the following is stated:

"What one has an absolute right to do, he may do without liability of any character, even though he exercises this right with the malicious intent of inflicting injury on another * * * * hence every free man, whether skilled laborer, mechanic, farmer or domestic may work or not work, work or refuse to work with any company or individual at his own option, except so far as he is bound by contract, and whatever may be his motive, or whatever may be the resulting injury arising from it, the law can afford no redress. The right is one of which a person cannot be deprived even by the legislature itself. It is clear, then, that one in the employ of another under contract terminable at will has an absolute right to quit or threaten to quit his employment, and his motives for so doing are beyond inquiry."

A statute of the United States (Act of June 1, 1898, 30 St. at L. 424, Ch. 370, U. S. Comp. St. 1901, page 3205) making it a criminal offense against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employe from service to such carrier, because of his membership in a labor organization, was held to invade personal liberty and the right of property without due process of law, in violation of the United States Constitution, Fifth Amendment, so held by the United States Suone in the employ of another under a con- 208 U. S. 161, 28 S. Ct. 277. The Court in this case further held that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to enact such a statute.

Referring to the provisions of the Fifth Amendment, declaring that no person shall be deprived of liberty or property without due process of law, the Court in the last mentioned case said:

"Such liberty and right embraced the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. * * * * It was the legal right of the defendant, Adair—however unwise such a course might have been to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. * * * * The latter was at liberty to quit the service without assigning any reason for his leaving, and the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing."

A Kansas statute (Laws of Kansas 1903, Chapter 222) under which, as construed and applied by the highest state court, an employer or his agent may be criminally punished for having prescribed as a condition upon which one may secure

employment under, or remain in the service of, such employer (the employment being terminable at will) that the employe shall enter into an agreement not to become or remain a member of any labor organization while so employed, was held in Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, to infringe upon the rights of personal liberty and property without due process of law, contrary to the Fourteenth Amendment of the United States Constitution. Referring to the Adair case, mentioned above, the court in the Coppage case said:

"Unless it is to be overruled, this decision is controlling upon the present controversy; if even Congress is prevented from arbitrary interference with the liberty of contract because of the due process provision of the Fifth Amendment, it is too clear for argument that the states are prevented from the like interference by virtue of the corresponding clause of the Fourteenth Amendment; and hence, if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employee with the loss of employment, or discriminating against him because of his membership in a labor organization, it is unconstitutional for a state to similarly punish an employer for requiring his employee, as a condition of securing or retaining employment to agree not to become or remain a member of such an organization while so employed."

Incidentally, attention may be called to the fact that the Kansas statute providing a system of compulsory arbitration of industrial disputes in certain businesses declared to be affected with a public interest, has been held in Dorchy v. Kansas, 264 U. S. 286, 44 S. Ct. 323, to be unconstitutional as applied to coal mines. The same statute was declared unconstitutional in so far as it relates to packing plants, in the case of Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630.

NOTES OF IMPORTANT DECISIONS

NEGLIGENCE OF BOTTLING COMPANY IN PERMITTING CONTAMINATION OF BEVERAGE.—In the case of Rudolph v. Coca Cola Bottling Company, 132 Atl. 508, decided by the Supreme Court of New Jersey, it is held that evidence that the plaintiff, after drinking some of the contents of a bottle of Coca Cola, discovered a piece of suspender strap therein, which caused her to become sick, constituted a prima facie case as to the negligence of the defendant, Coca Cola Bottling Company, which was for the jury. It is further held that evidence that the bottle was sealed at the time the plaintiff purchased it, and the storekeeper opened it; that plaintiff used a straw in drinking, and that the strap and the beverage were of similar color, was *per se* sufficient to justify a finding that plaintiff was not guilty of contributory negligence, and created a jury question. It was further held that a showing that the storekeeper purchased the bottled Coca Cola, marked with the company's name, from a branch of the Coca Cola Company, which was delivered by their driver, was sufficient to show liability on the part of defendant and to justify a refusal of non-suit on the ground that defendant company was not shown to have furnished the particular bottle of beverage.

LIABILITY OF SELLER OF MANUFACTURED ARTICLE TO THIRD PERSON. The case of Pate Auto Co. v. Westbrook Elevator Co., 107 So. 552, decided by the Supreme Court of Mississippi, holds that any liability of seller of manufactured article for damage from defect therein to a third person with whom he has no contractual relations, is dependent on some fraud, deceit, or concealment, or on some negligence, or omission of duty, such as reasonable inspection to discover defects in material or workmanship, so that no cause of action is stated by mere general charge that elevator, sold by defendant to plaintiff's lessor, was of defective and inferior material and workmanship, and by reason thereof it fell.

On this important question the Court said:

"There is a conflict in the authorities upon the question of whether or not a contractor, manufacturer, or vendor of an article is liable to third parties who have no contractual relations with him, for negligence in the construction, manufacture, or sale of such articles. The line of cases which hold that one who manufactures an article or machine, which is rendered imminently dangerous by reason of negligent construction, is liable to third parties for in-

juries or damage resulting from such negligence, is illustrated by the cases of MacPherson v. Buick Motor Co., 111 N. E. 1050, 217 N. Y. 382, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, and Johnson v. Cadillac Motor Co. (C. C. A.) 261 F. 878, 8 A. L. R. 1023, and authorities therein cited.

"The opposite view is held by the United States Circuit Court of Appeals in the Eighth Circuit in the case of Huset v. J. I. Case Threshing Machine Co., 120 F. 865, 57 C. C. A. 237, 61 L. R. A. 303, in an opinion by Judge Sanborn, which reviews all the leading English and American decisions on the subject up to that date, and announces the general rule to be that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. To this general rule the opinion in the Huset Case, supra, announces that there are three well defined and settled exceptions—the first being that an act of negligence of a manufacturer or vendor, which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, such as drugs or food, is actionable by third parties who suffer from the negligence; the second exception recognized is that 'an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner'; while the third is 'that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another, without notice of its qualities, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not.'

"Upon the averments of the bill of complaint in the case at bar, however, we do not deem it necessary to decide what are the limits of the liability of manufacturers and vendors for negligence in the manufacture and sale of an article. An examination of the various cases which have held that the manufacturer or vendor of an article is liable to third parties with whom he has no contractual relations shows that liability is made to depend upon some fraud, deceit, or concealment, or upon some negligence, or omission of duty, such as reasonable inspection to discover defects in material or workmanship, while in the bill of complaint in the present case there is no averment of fraud or concealment, or that the defendant was negligent in any respect in the manufacture or construction of the elevator, or that the defendant knew of any defect in workmanship or material, or could have discovered the same by reasonable inspection. The only charge in the bill of complaint is the general one that the elevator was made of defective and inferior material and workmanship, and that by reason of said defects it was caused to fall. There is no averment of facts from which the inference of negligence necessarily arises, and we think the demurrer to the bill of complaint was properly sustained."

SUICIDE WHILE SANE PRECLUDES RECOVERY ON ACCIDENT POLICY.—The case of Von Crome v. Travelers' Ins. Co. (C. C. A.), 11 F. (2d) 350, holds that where suicide while sane of one insured against death by accident was established, Rev. St. Mo. 1919, § 6150, declaring suicide not a defense unless contemplated when policy was taken out, did not entitle beneficiary to recover, death not being accidental, nor had insured, whose policy was contract from year to year, renewable by payment of premiums, by reason of judicial construction prevailing when policy was taken out, anything in the nature of a vested right to commit suicide, which could not be abrogated by change in judicial construction, and which would support recovery where, after such change, he renewed contract four times.

After discussing the case at considerable length, the Court said:

"It follows, that there is nothing in the Missouri ruled cases to militate against the defense of suicide here, or which holds that section 6150, supra, applies to suicide by a sane person when insured against death by accident, and when a suit is brought upon such a policy. It is true that much sweeping language is to be found in the Logan Case, but, as said already, when the facts up for judgment in that case are examined, it will be seen that the fact there conceded, namely, that death, though caused by self-destruction, was accidental, clearly distinguishes it from the Brunswick Case. But plaintiff erroneously contends contra, and further contends that the case of Whitfield v. Ætna Life Ins. Co., 27 S. Ct. 578, 205 U. S. 489, 51 L. Ed. 895, decided in 1907, sustains her position and had the effect to give insured, who took out his policy in 1913, a sort of vested contractual right to commit suicide, which the ruling in the Brunswick Case in 1919 was impotent to affect in any wise. Query may well be made here whether this contention will apply when some four annual renewals of the original contract were made after the Brunswick Case was decided and before the death of the insured. Eicks v. Casualty Co. 253 S. W. 1029, 300 Mo. 279; North

American Oil Co. v. Globe Pipe Line Co. (C. C. A.) 6 F. (2d) 564; Donnelly v. Insurance Co., 192 N. W. 585, 222 Mich. 214; Steele v. Indemnity Co., 197 N. W. 101, 158 Minn. 160; Hoyt v. Insurance Co., 113 A. 219, 80 N. H. 27; Richmond v. Insurance Co., 130 S. W. 790, 123 Tenn. 307, 30 L. R. A. (N. S.) 954; Pac. Mutual Ins. Co. v. Vogel (C. C. A.) 232 F. 340; Brawner v. Indemnity Co., 246 F. 637, 158 C. C. A. 593.

"But, passing that suggestion for the present, it must be conceded that the broad language of the Supreme Court of the United States in the Whitfield Case seemingly construes section 6150, supra, as applying to a Missouri policy covering death by accident, when such death shall occur by suicide, whether the insured shall be sane or insane. In so doing, it followed what it conceived to be the construction put upon the statute by the Supreme Court of Missouri in the Logan Case; although, as the Brunswick Case labored to show, the Logan Case laid down no such all-embracing rule, so far as concerned the facts up for judgment in that case.

"That this holding by the Supreme Court of the United States in the Whitfield Case was in deference to its view of the Logan Case is conclusively demonstrated, when it is considered that that court, 21 years before had held, in the case of Travelers' Ins. Co. v. McConkey, 8 S. Ct. 1360, 127 U. S. 661, 32 L. Ed. 308, that in an action on a policy of insurance insuring against death by accident, the burden was on plaintiff therein to show death by accident and that death by suicide was not an accident, which is about all that was held by the Missouri court upon this same point in the Brunswick Case. This clearly indicated as forecast, that in ruling in a thorough-going way in favor of the application of section 6150, supra, to all policies insuring against death by accident, as it seemingly did in the Whitfield Case, the Supreme Court of the United States was misled by the broad language of the Logan Case, and so felt constrained to follow what it believed to be the ruling of the Supreme Court of Missouri in the matter of the construction of a local statute."

Those who associate daily with the great are not impressed, perhaps, as others.

A young man with a message for a magnate was compelled to wait 20 minutes in the outer office. The magnate wasn't doing anything and the messenger knew it. Finally he was admitted and welcomed with a frown.

"Well, sir, what is it? Time is money, time is money."

"I have a card here from my boss, Mr. Gottalot. He wants you to squander about $3,000 worth on the golf links this afternoon."—Pittsburg Chronicle Telegraph.

USE OF STATE AGENCIES IN AID OF DISCHARGE OF FEDERAL FUNCTIONS

By Executive Order No. 4439, dated May 8th, 1926, published May 21st, the President amended an Executive Order of January 17th, 1873, by adding a paragraph so as to permit state officers to be commissioned as Federal agents, at a nominal salary, to co-operate for the better enforcement of the National Prohibition Act. The order expressly provided that no such commission should be given any state officer where the exercise of dual authority was prohibited by state law. The legality of the order has been questioned. The order is as follows:

"In order that they may more efficiently function in the enforcement of the National Prohibition Act, any state, county or municipal officer may be appointed at a nominal rate of compensation as prohibition officer of the Treasury Department to enforce the provisions of the National Prohibition Act, and acts supplemental thereto, in States and Territories except in those States having constitutional or statutory provisions against State officers holding office under the Federal Government."

In order to determine the legality of the order it is first necessary to analyze its provisions to ascertain its scope. The following will be noted with reference to it:

First. It did not make any attempt to change the law. It simply announced an alteration in administrative policy. President Grant had by Executive Order, issued in 1873, declared that no person holding a Federal position should hold office under any state or local government, but to this order President Grant made certain exceptions as follows:

"(a) Justices of the peace, notaries public, commissioners to take acknowledgment of deed, of bail, or to administer oaths.

"(b) Deputy marshals, who may hold at the same time state office of sheriff or deputy sheriffs.

"(c) Deputy postmasters, the emoluments of whose office do not exceed $600 per annum.

"(d) Members of boards of education, school committees.

"(e) Officers of the state militia, because, 'Congress have exercised the power conferred by the Constitution to provide for an organized militia, which is liable to be called for to be employed in the service of the United States, and is thus in some sense under the control of the general government, and is, moreover, of the greatest value to the country.' "

All that the President's order did, therefore, was to remove the inhibition against the employment of state officers as Federal agents which existed by virtue of the policy adopted by President Grant. The exceptions contained in President Grant's order clearly showed that in the absence of this policy declared by the President the law would permit the appointment of state officials to discharge Federal functions.

Second. Under President Coolidge's order the power to commission is permissive only. It does not commission all state officers as Federal agents, but only such as are willing to co-operate and whose co-operation is accepted by the Federal government.

Third. The executive order of President Coolidge expressly provided that this policy should not apply in any state where such appointment would conflict with the Constitution or laws of the state. This express exception in the order, therefore, removes any possibility of a direct conflict of this order with the law of any state. This being true, the question at issue resolves itself into—First: Whether there is any express provision of the Constitution of the United States prohibiting the exercise of dual authority by Federal agents, or prohibiting the appointment of state officers to Federal positions. Second: Whether any implied prohibition can arise out of the relationship existing between the state and Federal Governments under the Constitution of the United States.

The only provisions of the Federal Constitution relating to dual officers are those contained in Article I, Section 6, declaring that no person holding any office under the United States shall be a member of Congress during his continuance in office. Article I, Section 9, prohibiting any person holding any office of profit or trust under the United States from accepting any emolument, title or office of any kind from any foreign state without the consent of Congress and Article II, Section 1, declaring that no person holding an office of trust or profit under the United States shall be a presidential elector.

There is no provision of the Constitution of the United States which expressly prohibits a Federal official from holding a state office, or a state official from holding a Federal office simultaneously.

In the final analysis the sole question is whether the relationship between the State and Federal Governments under the Constitution renders the discharge of the duties of the officer under one sovereign incompatible with the discharge of the duties under the other.

There are many precedents, dating from the very inception of the government, which show that the Federal Government may permit the use of state agencies to accomplish Federal functions without in any way violating the Constitution of the United States.

In addition Sec. 2 of the Eighteenth Amendment expressly provides for concurrent power in the States and Federal Government to enforce this constitutional provision.

Instances in Which Congress Has Authorized State Agencies to Perform Federal Functions.—The first Congress, which

met under the Constitution, enacted a provision which permitted state magistrates and courts to issue warrants of arrest for offenses against the laws of the United States and to certify such cases to the Federal courts for trial. This provision is now embodied in Section 1014 of the Revised Statutes of the United States. The original act upon which it was based was that of September 24th, 1789, chap. 21, 1 Stat. L. 91. The legality of this statute has never been successfully questioned.[1] The National Prohibition Act, Title II, Sec. 2, expressly makes Sec. 1014 applicable to its enforcement. The validity of this was upheld by the Supreme Judicial Court of Massachusetts, in Goulis v. Stone.[2] Other instances in which Congress has authorized the use of state agencies to accomplish Federal purposes are found in the fugitive slave laws. In Prigg v. Pennsylvania,[3] the question involved was the validity of the fugitive slave law which conferred authority upon state magistrates to act in the enforcement of that Act. Its validity was sustained.

Prigg v. Pennsylvania has been subsequently applied and sustained by the courts in connection with Federal legislation providing for the use of state tribunals and other agencies carrying out the Federal authority to condemn property;[4] providing for the use of state courts in carrying out Federal authority to arrest seamen offending against Federal law;[5] providing for the use of State courts in carrying out the Federal naturalization laws[6] and providing for the use of state executive officers in carrying out the provisions of the selective draft act.[7]

In the foregoing cases Congress has not attempted to commission the state magistrates or courts a part of the Federal officiary. These state magistrates and courts when acting in the discharge of the permissive authority conferred upon them by Congress, act by virtue of their authority as state officials in the exercise of a jurisdiction which is permitted them by Federal law.

The situation which arises when a state official is commissioned and clothed with authority as a Federal officer is different from that growing out of the discharge of the functions in the instances cited. Nevertheless as a matter of constitutional law no greater constitutional restrictions apply. Under the Federal law the only inhibitions placed upon the Federal administrative official in making appointments and granting commissions are those found in the Federal statutes. These limitations are fixed by the Civil Service Act; the provisions in certain statutes that military veterans shall be given a preference in appointment;[8] the prohibition against the appointment of bigamists;[9] and acts creating Federal offices in which special technical or scientific training is required. But in such cases the qualifications are written into the law. Aside from these and similar provisions there are no limitations upon the appointing power. The question, therefore, resolves itself, not into one of law, but into one of policy.

Precedents for the Order.—There are many precedents for this policy. Officers and employes of the Department of Agriculture are authorized to hold state and territorial positions when such action is deemed necessary by the Secretary of Agriculture to secure a more efficient administration.[10]

State and county officials may be appointed special agents under the Bureau of the Census for the collection of cotton statistics.[11]

(1) See Roberts v. Brown, 43 Tex. Civ. App. 296, 94 S. W. 388.

(2) 140 N. E. 294; see also Harris v. Superior Court (Calif.) 196 Pac. 895.

(3) 16 Peters 536.

(4) United States v. Jones, 109 U. S. 513, 519, 521.

(5) Robertson v. Baldwin, 165 U. S. 275, 279, 280, and Dallemagne v. Moisan, 197 U. S. 169, 173, 174.

(6) Holmgren v. United States, 217 U. S. 509, 517; Levin v. United States, 128 Fed. 826.

(7) Selective Draft Law cases, 245 U. S. 366, 389.

(8) R. S. Sec. 1754; Sec. 38, Title II National Prohibition Act, etc.

(9) 22 Sta. L. 31, Sec. 8.

(10) President Roosevelt's executive order of June 26, 1907.

(11) President Taft's executive order of August 4, 1909.

Employes of the Reclamation Service and the National Park Service may, with the approval of the Secretary of the Interior, accept appointments as deputy state fish or game wardens. If no compensation is attached to the position.[12]

Laborers in charge of lights in the lighthouse service are excepted from the operation of the order of January 17, 1873.[13]

Employes of the Treasury Department may, with the approval of the Secretary of the Treasury, accept appointment on any state, county or municipal council of defense for purposes of mobilizing and conserving the resources of the country.[14]

All of these executive orders rank as exceptions to the original Grant Order of January 17, 1873.

No Merit in Contention That Policy Will Destroy State Sovereignty.—There is no foundation for the suggestion that the policy proposed by the President's Executive Order may lay the foundation for the destruction of state sovereignty. In the first place the order does not draft any state officials into the Federal service. The option is left with the individual state official as to whether he will apply for the Federal commission. It is possible to conjecture situations in which the discharge of the duties of a state office and the discharge of the duties of a Federal prohibition agent might be incompatible. As for example, in the case of a judge, a governor, or an attorney general, who under the terms of the order might apply for a Federal commission as a prohibition agent. If by any stretch of the imagination such a commission issued, a situation might arise where the discharge of the obligation of the Federal office might prevent the proper discharge by the individual of his duties as a state officer. In such a contingency, however, the state would not be without a remedy. If it be shown that such an official was neglecting the duties of his state office, proceedings for removal could be instituted. The state, under this order, would still reserve the necessary authority to compel attention to state matters. On the other hand if there was a neglect of Federal duties the commission could be withdrawn.

In the case of many state peace officers, however, there are instances in which the exercise of the authority conferred by a Federal commission could be utilized in conjunction with the state authority as a means of better promoting law enforcement. The results to be derived from the exercise of this dual authority will depend very largely upon the wisdom of the Federal officers in granting these commissions and the fidelity, ability and common sense with which these State officers use the power given to them.

Report of the Senate Judiciary Committee:

Senator King, of Utah, introduced the following Resolution concerning the Executive Order:

"Resolved, That to enable the Senate to determine whether legislation is advisable or necessary, the Committee on the Judiciary be directed to inquire and advise the Senate as to whether the Executive Order dated May 8 and published on May 21, relating to the appointment of State officers as officers or agents of the Federal Government, is within the legal powers of the Executive."

This was referred to the Senate Judiciary Committee, which reported thereon.

The majority report declared:

"Nothing said herein is to be construed as an expression of either approval or disapproval of the policy evidenced by the notice or order of the President which has been the subject of discussion. * * * * No constitutional principle, express or implied, is violated even though it be contemplated that the appointee is to continue to hold the office he occupies under the authority of the State."

Two members of the committee signed a minority report.

WAYNE B. WHEELER.

Washington, D. C.

(12) President Wilson's executive order of July 9, 1914.

(13) President Wilson's executive order of October 6, 1915.

(14) President Wilson's executive order of April 14, 1917.

AUTOMOBILES—COLLISION

MURPHY v. HAWTHORNE

244 Pac. 79

(Supreme Court of Oregon, March 2, 1926.)

Parking a truck so as to extend 5 feet onto edge of highway, after dark, without displaying red light required under Or. L. § 4774, held negligence *per se*.

Robert F. Maguire, of Portland (Winter & Maguire, of Portland, on the brief), for appellant.

Frank C. Hesse, of Astoria (Norblad & Hesse, of Astoria, on the brief), for respondent.

BELT, J. About 6:30 o'clock in the evening October 19, 1920, plaintiff was driving his Buick roadster on the lower Columbia River highway toward the city of Astoria. He says that he was traveling about 25 miles per hour on the right side of the road with spotlight and headlights on full strength. There was no oncoming traffic, but he was nearly in the middle of a procession of 10 or 12 cars traveling in the same direction, and about the same rate of speed. A large passenger autobus going toward Astoria rapidly approached, sounded its horn, and plaintiff turned over to the extreme right of the pavement to let it pass. When this bus went by it "kicked up" enough dust to "obstruct" plaintiff's vision, but he drove on at about the same rate of speed. Suddenly and unexpectedly there appeared within plaintiff's range of vision a 3-ton truck belonging to the defendant, which had been parked on the right side of the highway without any light. The left front and rear wheels of the truck were about 5½ feet from the right edge of and on the pavement. Plaintiff testified that his automobile struck the left rear hub cap of the truck, and that this caused him to swerve to the left and into a ditch, although he did his best to avoid the collision. In response to the question, on cross-examination, "How far could you see in front of your car after that dust was raised by the passing bus?" plaintiff answered, "I wouldn't say whether 50 or 150 feet. I don't know; I was paying attention to my driving." When asked how far away he was when he first saw the truck, plaintiff testified, "I wouldn't say, because I don't recollect on account of the dust being in the air, whether 25 feet or 75 feet."

Under the undisputed testimony, we think it was negligence *per se* for defendant to leave this auto truck on the highway after dark without displaying a red light as provided by section 4774, Or. L. It was more necessary, so far as the safety of the public is concerned, to have such light on the truck when thus parked on the highway than it would be if it were moving. It would be contrary to the purpose and spirit of the statute so to construe it as being applicable only to motor vehicles in motion. Jaquith v. Worden, 132 P. 33, 73 Wash. 349, 48 L. R. A. (N. S.) 827; Berry on Automobiles (4th Ed.) §§ 188, 872; Babbitt on Motor Vehicles (3d Ed.) § 563.

Appellant's principal contention, aside from the question as to the proper measure of damages, is that we should hold as a matter of law that plaintiff was guilty of contributory negligence in failing to stop his automobile within the range of his vision. While some courts have announced a hard and fixed rule that it is negligence to drive an automobile at such rate of speed that it cannot be stopped within the range of the driver's vision (Lauson v. Fond du Lac, 123 N. W. 629, 141 Wis. 57, 25 L. R. A. [N. S.] 40, 135 Am. St. Rep. 30; West Construction Co. v. White, 172 S. W. 301, 130 Tenn. 520; Knoxville Ry. & Light Co. v. Vangilder, 178 S. W. 1117, 132 Tenn. 487, L. R. A. 1916A, 1111; Jones v. Sunshine Grocery & Market [Tex. Civ. App.] 236 S. W. 614), we think it improper to do so. Each case must be considered in the light of its own peculiar state of facts and circumstances. After all, the test is, what would an ordinarily prudent person have done under the circumstances as they then appeared to exist? Can we say that all reasonable minds would reach the conclusion that plaintiff failed to exercise due care to avoid this collision? We think not. Plaintiff had a right to assume, in the absence of notice to the contrary, that defendant would not put this dusty, gray colored truck on the highway after dark without displaying a red light on the rear thereof. If the truck had been lighted, the jury might well have drawn the reasonable inference that plaintiff would have been able to avoid striking it. As stated in Haynes v. Doxie, 198 P. 39, 52 Cal. App. 133:

"Notwithstanding the facts stated, it may also be true that if the truck had been lighted as required by law, plaintiff would have been able to see it, and would have seen it, while at a distance great enough to enable him to stop his automobile and avoid the collision."

In Hallett v. Crowell, 122 N. E. 264, 232 Mass. 344, it was said:

"The jury doubtless could find that the plaintiff's motorcycle, lighted as required by law, could be stopped at the rate of speed he was going within a distance of 15 feet and that he was about 25 feet distant when he saw the rear

wheel of the defendant's unlighted farm wagon. But the defendant was violating the statute, and the jury could find that the plaintiff did not know the wagon was ahead until he observed the glitter of his own headlight upon the rim of the right outside rear wheel of the wagon, when, although driving at proper speed and immediately turning to the left as far as he could, he came into collision with the * * * wheel * * * and was injured severely. * * * It was therefore a pure question of fact whether under all the circumstances he exercised the care of the ordinarily prudent traveler."

In Corcoran v. City of New York, 80 N. E. 660, 188 N. Y. 131—a case involving a similar state of facts—we find this significant language:

"We are also of the opinion that the question of contributory negligence was one of fact for the consideration of the jury. The automobile was going at the rate of 8 to 10 miles an hour, and Noyes was shown to have been an experienced and careful operator. Although the testimony tends to show that this automobile, weighing 3,000 pounds, and going at the rate of from 8 to 10 miles an hour, could have been stopped in from 18 to 20 feet, it is still a question of fact whether under the conditions which existed the guard rail and fence were visible from a sufficient distance to make such a stop possible. It is true that one of the occupants of the tonneau testified that the fence could be distinguished at a distance of 15 feet, but that is by no means conclusive, for the plaintiff was entitled to the benefit of the legal principle that a traveler on a city street has the right to assume that all the parts thereof intended for travel are safe, and he is not open to the imputation of negligence if he fails to discern an unknown and concealed danger at the very instant necessary to prevent an impending disaster."

While there is authority to the contrary, we believe the better reasoned cases support the holding that whether plaintiff failed to exercise due care to avoid the collision was a question of fact for the jury. Wurl v. Watson, 228 P. 43, 67 Cal. App. 625; Haynes v. Doxie, supra; Ross v. Hoffman et al. (Mo. App.) 269 S. W. 679, distinguishing prior decisions of that court and considering Lauson v. Fond du Lac, supra, upon which appellant so much relies; Hatch v. Daniels, 117 A. 105, 96 Vt. 89; Tutsch v. Omaha Structural Steel Works, 194 N. W. 731, 110 Neb. 585; Bancroft v. Town of East Montpelier, 109 A. 39, 94 Vt. 163; Berry on Automobiles (4th Ed.), § 873. No error was committed in denying motions for nonsuit and directed verdict.

Appellant predicates error on the giving of the following instruction:

"As I said, a person traveling the highway has the right to assume that all other persons also using that highway would observe the laws, and he is not bound to keep a lookout for others who may violate the law. So if in this case you find that the defendant had parked his car upon the highway during the period of an hour or more after sunset and an hour before sunrise plaintiff would not be obliged to keep a lookout for him nor assume he might be there. But when approaching the truck he could not ruthlessly run into it or run it down simply because it was violating the law, and it would be his duty under such circumstances to use every reasonable effort to avoid colliding with it, and if he did so use every effort and care that a reasonably prudent and careful man would have used under such circumstances, and notwithstanding such effort a collision occurred, the plaintiff would not be liable nor guilty of contributory negligence, nothwithstanding the other car was negligently left there."

This instruction, considered in its entirety, is not objectionable. We take it that it is not necessary to cite authorities to establish the proposition that plaintiff had the right to assume that defendant would obey the law of the road.

Appellant urges that the court erred in instructing the jury relative to the measure of damages as follows:

"In that case you would want to allow him such amount as would make the whole of the injury; that is, so that he would not be any the poorer on account of the accident. And in doing that you may take into consideration the reasonable cost of the parts that were or are necessary to be replaced, and the reasonable cost of the materials and labor necessarily employed in making the repairs to the car, and the cost of removal, if any, of the car from the place of the collision to the repair shop. Such amount, however, could not under any circumstances, exceed the amount asked for in the complaint; that is, $435.40. And in considering those facts you would not include any items that were not necessarily required to replace or repair the parts of the car injured by this accident. In other words, the mere fact that the car when it was repaired for the damages received at the accident, if any, received other improvements that added to the value of the car over and above its former value, or made it a better car in any particular, but were not due as a result of the injuries received in the accident, he would not be entitled to recover for that, but only such amount as was necessarily incurred by reason

of the repair rendered necessary by the accident. And then he could only recover the reasonable value of those repairs and the labor employed in making the repairs. It would not be a question of how much he actually paid out for it, but would be the reasonable worth on the market, both of the labor and material, to have the car repaired. After determining these amounts, you should insert the total amount in your verdict as the amount you find the plaintiff was damaged. * * *"

As stated in Hansen v. O. W. R. & N. Co., 188 P. 963, 97 Or. 190; and approved in Longbotham v. Takeoka (Or.) 239 P. 105:

"The measure of damages for an injury to personal property is generally the difference between its value at the place immediately before and immediately after the injury."

It would have been more accurate for the court to have followed this well-established rule, but we fail to see wherein appellant was injured by the instruction given. Ordinarily, the reasonable value of repairs to put an automobile in substantially the same condition it was in prior to the collision corresponds to the difference between the value of the car before and after it was struck. Indeed, it is favorable to appellant, in that it eliminates the element of depreciation in value resulting from the automobile having been in a collision. If there were any evidence tending to show that the cost of repairs exceeded the difference in value of the automobile before and after the accident, defendant would have cause to complain. As held in Overpeck et al. v. City of Rapid City, 85 N. W. 990, 14 S. D. 507:

"Presumptively, at least, the difference in its value before and after it was injured would be the amount that it would cost to repair it, and restore it to its former condition. Assuming the rule, therefore, as claimed by the appellant, to be the better rule, * * * yet the adoption by the court below of the other rule would not, in our opinion, constitute reversible error."

Appellant's contention was made in Lonnecker v. Van Patten (Iowa) 179 N. W. 432, and the court said:

"It is thought by appellant that the court erred in the instructions to the jury in regard to the measure of damages for that he contends that, in the absence of total destruction of the property, the measure is the difference in value immediately before and immediately after. At this point the court instructed that the measure would be the reasonable cost of repairs made, or necessary to be made, to place his car in as good condition as it was just prior to the collision, and for the reasonable value of the use of said car during the time it was reasonably necessary to make the repairs on the same so it could be operated, etc. Doubtless the rule contended for, by appellant, would have been appropriate; but the rule adopted by the court was likewise so. Ordinarily, there would not be any material difference between the value before and after it was injured and the actual cost of the repairs required to return it to its former condition; that is, the difference in value before and after would be the amount that it would cost to repair it and return it to its former condition."

It is certain that evidence of reasonable value of repairs is admissible relative to the value of the automobile after it was injured. Southern Ry. in Kentucky v. Kentucky Grocery Co., 178 S. W. 1162, 166 Ky. 94; Hintz v. Roberts, 121 A. 711, 98 N. J. Law, 768; Blanke v. United Ry. Co. (Mo. App.) 213 S. W. 174; Hughes v. Wells, 79 A. 1035, 81 N. J. Law, 339; Knudson v. Bockwinkle, 208 P. 59, 120 Wash. 527; Madden v. Nippon Auto Co. 206 P. 569, 119 Wash. 618.

There are 35 assignments of error, but we have selected only those for consideration which we deem material, and upon which we believe counsel for appellant seriously rely for reversal. The court fully and fairly submitted the issues, and sustantial justice has been administered.

It follows that the judgment of the lower court is affirmed.

NOTE.—*Negligence and Contributory Negligence in Driving into Collision with Unlighted Automobile Standing in Highway at Night.*—In Reincke v. Tacoma Railway and Power Co., 244 Pac. 577, the Supreme Court of the State of Washington held that the driver of an automobile colliding at night with the rear of a truck standing near the center of a lighted street, was guilty of negligence, precluding recovery for injuries so sustained.

In the case of Koplovitz v. Jensen, 151 N. E. 390, decided by the Supreme Court of Indiana, it was held that colliding with a truck parked on a highway at night without a tail-light, did not render the driver of the automobile colliding therewith guilty of contributory negligence as a matter of law, where he had dimmed his lights on meeting another car, and turned on the bright light to find the truck immediately before him. In this case it is also held that a statute requiring motor vehicles to display a red tail-light while "operated or driven" on the highways at night, applies to vehicles parked on the highway, as well as to moving vehicles.

The case of Bayuk Bros. v. Wilson Martin Co. 81 Pa. Super. Ct. 195, holds that it is negligence to leave an automobile standing unlighted in a public highway at night, in violation of statute. And in Clark Bros. Co. v. United Railways and Electric Co., 137 Md. 159, 111 Atl. 829, it is

held that the fact that a truck standing in a highway at night and with which another vehicle collided, had no lights as required by law, was properly considered on the issue of defendant's negligence.

In Jones v. Sunshine Grocery & M. Co., 236 S. W. 614, decided by the Texas Court of Civil Appeals, it is held that a driver colliding with an unlighted truck standing in the highway at night was guilty of contributory negligence, where it appears that he would have avoided the collision had his lights met the requirements of the law and he had exercised ordinary care.

It was held on the facts in Rice v. Foley, 98 Conn. 372, 119 Atl. 353, that the cause of the collision was the negligence of the defendant, owner of a truck, parked at the side of a street, without lights, and with which the plaintiff drove into collision.

ITEMS OF PROFESSIONAL INTEREST

RUM-RUNNING AND THE THREE-MILE LIMIT

The United States Circuit Court of Appeals has held that the treaty with Great Britain to extend the right of search of suspected vessels to twelve miles or an hour's steaming from the coast cannot operate to give the revenue authorities powers they did not previously possess. And since the United States, like ourselves (and therein differing from Norway, Sweden, Spain, etc.) adheres in the ordinary course to the doctrine of the three-mile limit only, power to seize and search rum-runners flying the British flag is put back as before the treaty. The court left the question open whether Congress had power to implement the treaty in accordance with it, since such a power, if any, had remained unexercised. The decision, in effect, is regarded as a bootleggers' charter. In the short cabled reports the arguments are not stated, but one would have thought that something might have been made of the point that, after the treaty, every British vessel impliedly submitted to the jurisdiction of the American authorities as enlarged by it. But the distinction must be carefully remembered between the jurisdiction over foreign vessels on the high seas assumed by our own and possibly other Admiralty Courts, administering the general maritime law, and one arising purely out of a local revenue law. The general rule is beyond question that revenue vessels have no power of search over foreign ships beyond their own maritime belt, and a local law purporting to give such power would not be recognized by other nations. Obviously, however, our own Government, in view of the treaty, would not have protested in the present case, and the right declared is that of the private owners. The decision, whether it will be upheld or otherwise, does not reflect much credit on the diplomatists of either nation. The treaty strained the doctrine of the three-mile limit, one of great value to us elsewhere, and a bad precedent has been created by a document now held to be valueless. If a British Act of Parliament had been passed, forbidding vessels under our flag to carry liquor cargoes over any reasonable area of the Western Atlantic, save by permit, and a British officer had been placed in each American revenue boat to give the requisite authority, the jurisdiction to seize would have been beyond question, and no doubt the United States Government would gladly have defrayed the expense of administering such a law. With similar statutes in aid passed in Norway, Sweden, etc., the seas could have been kept clear from smugglers for hundreds of miles from the coast. —Solicitors' Journal (Eng.), May 8, 1926.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION NO. 237

John Doe is a member of the New York Bar, having an office in the City of New York. Two years ago he became a resident of a City in an adjoining State. He is not a member of the State Bar of such State, but is a member of the Bar of the United States District Court for the District of such State.

Local lawyers in such State carry cards in the local papers.

Would it be ethical for John Doe to insert a card in the local paper at his residence as follows:

"John Doe, Counselor-at-Law, Broadway, New York City. Residence: (stating it). Telephone (stating his residence telephone).

and consult with residents of such State at his residence in regard to legal matters which might be placed in his hands by them for attention in New York, a number of his friends and acquaintances having business in New York?

ANSWER NO. 237

In the opinion of the Committee, if the attorney's card be so worded as to exclude the inference that the attorney is a member of the State Bar of the adjoining State, and if his advertisement or his practice of giving or his giving of such advice in such adjoining State be not in conflict with the law of such adjoining State, the insertion of such a card in a local

paper is a matter of taste only, and is not unethical or unprofessional. For example, a card in the following form, under the conditions stated, would in the opinion of the Committee, be unobjectionable:

JOHN DOE
Attorney-at-Law
of the State of New York (or in the Federal Courts as stated)
..... Broadway, New York City
Residence: (Stating it)
Telephone: (Stating his residence phone).

QUESTION No. 239

There is under consideration by a daily trade paper having a wide territorial circulation and publishing news of the Courts and legal notices, a plan to publish daily in the paper a limited list of law firms, specializing in commercial law practice, adjustments, collections, etc., covering every trade center throughout the United States, and classified alphabetically according to States.

The paper expects to charge an advertising rate for the appearance and publication of the names, but primarily the publication has been determined upon to provide subscribers with a national list of attorneys to whom they could forward, direct, collection items and other matters requiring the attention of a lawyer.

These names will be taken from a much larger list of commercial lawyers published by a reliable and very widely known corporation; the larger list will be named at the head of the newspaper's column as the source of the limited list.

The heading will state further that all firms listed provide service in adjacent or regional territory through traveling adjusters or resident correspondents.

Lawyers admitted to the newspaper's list will merely pay the fixed advertising rate, varied, however, according to the commercial importance of their community; and nothing but their name and address will appear, except in the explanatory heading of the source, character and purpose of the list; the newspaper is not a forwarder nor a receiver nor a solicitor of claims; and will have no connection with them save the publication of the list; the advertising rate will have no relation to the lawyers' fees.

In the opinion of the Committee is there any professional impropriety in a lawyer permitting his name to appear in such list, and paying the advertising rate therefor, or in such publication by the newspaper?

ANSWER No. 239

The following is the opinion of the majority of the Committe:

The American Bar Association has condemned the bonding of attorneys in the faithful performance of their duties as attorneys. (Vol. XLVIII, Annual Reports, 1923, pp. 60, 285). Its Committee on Commerce, Trade and Commercial Law reported that this manner of use of attorneys' names for advertising purposes (i. e. lists of bonded attorneys) should not meet with the approval of the Association, and that it is contrary to the dignity of the profession and detracts from it for an attorney to have advertised that he is a guaranteed lawyer in a collection agency list in order that he may get credit for faithfulness in his business, upon the ground that such a custom is beneath the honor and dignity of the profession. This Committee concurs in that disapproval.

If the list of lawyers, as proposed in the question is, whether so stated or not, to be confined to lawyers who have given such bonds, this Committee cannot approve its publication. Otherwise, the Committee cannot see any more objection to its publication in a trade paper than in the current annuals of law lists. (See Committee's Answer No. 47 indicating matters to be avoided, which from the present question appear to be here avoided).

Then, as to the propriety of a lawyer paying for the insertion of his name in such a list. This Committee recognizes the fact that lists of reputable capable lawyers are of much use to merchants and to lawyers as well. Although, strictly speaking, such a payment is for an advertisement, yet where the amount paid is insignificant, the Committee is of the opinion that the same answer should be given as it gave to Question No. 1, that it is a matter of personal taste.

A minority of the Committee are of the opinion that paid advertising by a lawyer in a law list is objectionable.

The above question and answer were submitted in behalf of this Committee to the Committee on Professional Ethics of The Association of the Bar of the City of New York for an expression of its opinion and said Committee adopted the following answer as the opinion of a majority:

A majority of this Committee concur in the foregoing opinion of the Committee on Professional Ethics of the New York County Lawyers Association; in so concurring, however, the Committee recognizes the indefinite implication of the word "insignificant," and thereby it means that the amount paid shall not justify the

inference that it is a payment for a recommendation nor the buying of business by the lawyer in any guise.

QUESTION No. 240

A lawyer was formerly employed by X to institute an action against Y; the action was compromised, and Y then employed the lawyer to represent him in a commercial matter. Both employments terminated.

X has now consulted the lawyer with a view to employ him to represent Y's wife (the sister of X) in a matrimonial action.

In the opinion of the Committee should the lawyer's former employment by Y preclude his acceptance of the present retainer in behalf of Y's wife—there being no relation whatever in the former employment or in anything then learned by the lawyer, to the present controversy between Y and his wife; and Y being presently represented by other counsel?

ANSWER No. 240

It is the opinion of the Committee that the question discloses no fact upon which any contention of professional impropriety could be predicated.

BOOK REVIEWS

I'LL NEVER MOVE AGAIN

Mr. Fitzhugh Green is the author of a genuinely humorous book entitled as above, illustrated by Don Herold, and published by E. P. Dutton & Co., New York City.

The author has moved so often—in fact, fifty-two times—that he has become expert in construing provisions of leases, and what he says about them is enlightening and, if you are fond of humor, highly entertaining. Not only does he analyze the lease, but he tells you how to find out what sort of neighbors you are going to have; how to look for weak points in the house you are thinking of buying; how and when to buy, and especially when not to buy, and a host of other important details that get the inexperienced mover into trouble.

The book abounds with sage advice from one who has evidently had much practical experience. A chapter is devoted to the family lawyer. In fact, any lawyer will enjoy this book, as it deals in great part with phrases and provisions with which he is famliar, from a new viewpoint and in a humorous vein. It deals with landlords and puppydogs, flivvers and fancy work, cockroaches and caretakers, disappearing ink and diapers, lawyers and land sharks, plumbers and policemen, furnaces and fuel.

We recommend that you read it, as we can't give you even a faint idea of its qualities.

NOTES TO STATUTES OF INDIANA

We are in receipt of a volume of Notes to Statutes of Indiana (new series), edited by Emerson E. Ballard, A. M., editor of "Indiana References and Annotations," and published by National Annotating Company, Crawfordsville, Indiana.

The volume combines annotations to statutes and digest of cases under one arrangement, which is familiar to all who have had occasion to make use of the Indiana decisions to any extent. It brings this work down to date. This is considered to be one of the most valuable works of the kind. It is done with painstaking care, with the result that clear cut, well edited statements are given of every point contained in the decisions of the Indiana Supreme and Appellate Courts, which construes or applies any section of the statutes, touches a subject covered by a statute, or is purely common law. All matter is arranged under the section numbers and chapter headings of Burns' Statutes 1914 and Burns' Supplement 1921, in their proper order. A Topical Index at the close of each volume enables the lawyer to locate any point. Where any decision overrules, modifies, criticises or distinguishes a former case, that fact is noted in direct connection with the statement made of a later decision. This information is placed where it cannot be overlooked.

References are given to selected current decisions of the courts of other states construing similar statutes, and to the notes and articles in the current volumes of American Law Reports, Central Law Journal; also to notes in Lawyers Edition of United States Reports, and "Notes of Decisions" in United States Compiled Statutes.

This is a highly valuable working tool which the Indiana Lawyers and other lawyers having to do with the Indiana laws cannot afford to dispense with for the very nominal price at which it sells.

The rival candidates were stumping the state, and one found fault with the other's lack of energy.

"Ladies and Gentlemen," he said, "my opponent is actually so lazy that there is really only one position he is fit to fill."

"What is that?" he was challenged.

"Pork inspector of the City of Jerusalem."

—Wag Jag.

DIGEST

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Bed of Millpond.—Mere use of water of pond will not give prescriptive title to its bed.—Evans v. Joseph, Del., 132 Atl. 891.

2. **Appeal and Error**—Instructions.—Rule as to right of court to hold an ordinance of a municipality void for unreasonableness does not apply to statute, such as Rem. Comp. Stat. § 6339, enacted by Legislature.—Buell v. Park Auto Transp. Co.—Wash., 244 Pac. 993.

3. **Associations**—Injury on Fairground. — Workman on automobile truck, removing paraphernalia of concessionaire on fairground, was invitee of company operating fairgrounds, and was owed duty of reasonable care.—Kelly v. Northampton County Agricultural Society.—Pa., 132 Atl. 832.

4. **Attorney and Client**—Contingent Contract.—Where a person, injured by the negligence of another, assigns a part of his cause of action to his attorney in payment for the services of the attorney, and the person or corporation causing the injury has notice thereof, and after such notice of such assignment settles the cause with the injured party without consulting the attorney, such settlement does not affect the right of the attorney to recover on his part of the cause of action covered by the assignment.—Lamar Hardwood Co. v. Case, Miss., 107 So. 868.

5.——Corporation Cannot Practice Law.—Complaint, showing corporation was engaged in rendering legal services by employing attorneys for its patrons at a yearly rate held to state cause of action for exclusion of defendant from practice of law.—People v. California Protective Corporation, Cal., 244 Pac. 1089.

6. **Automobiles**—Animal on Highway. — Defendant, in permitting his boar to run at large on the highway in violation of statute requiring him to "restrain" it held prima facie negligent under Code 1897, §§ 2312-2314, read with Code 1924, §§ 1846, 1849, 2980-2984 (Code Supp. 1913, § 2367), where automobile collided with animal; restraining being used variably and relatively, and the duty which it denotes varying with various relations to which the statutes are applicable.—Hansen v. Kemmish, Iowa, 208 N. W. 277.

7.——Barrier as Warning.—Maintaining barrier across bridge, making it necessary for automobiles to turn into intersecting street, without warning other than barrier itself held not negligent.—Butcher v. City of Racine, Wis., 208 N. W. 244.

8.——Contributory Negligence. — Truck driver, testifying that, if he had notice, he could stop truck in five feet, and, if there was nothing in front, could stop it in eight or nine feet at speed he was running at time of collision with truck ahead, which suddenly stopped without notice held not contributorily negligent as matter of law.—Harnik v. Astoria Mahogany Co., N. Y., 215 N. Y. S. 219.

9.——Contributory Negligence.—Driver of motorcycle, going at 10 miles per hour 5 feet from curb of street 30 feet wide held not contributorily negligent as matter of law in striking leg against rear bumper of approaching automobile, traveling at 15 miles per hour, which turned into private driveway without signal from point near opposite curb.—Trimble v. Price, Mo., 282 S. W. 89.

10.——Contributory Negligence.—Where bicycle rider coasted down a hill at such speed as to be unable to control the bicycle, and hit an automobile at street intersection held he was negligent, and could not recover, except under the doctrine of last clear chance.—McGowan v. Tayman, Va., 132 S. E. 316.

11.——Contributory Negligence.—In action for personal injuries tried by court without a jury, it was question for court under the evidence whether plaintiff was contributorily negligent, proximately contributing to his fall and injury by riding on fender of truck and holding on to the door and top of the car.—Starkey v. Starkey, Ala., 107 S. 807.

12.——Duty of Guest.—Guest in automobile is not bound as matter of law to keep continual lookout for causes which might occasion injury.—In re Hill's Estate, Iowa, 208 N. W. 334.

13.——Left Turn.—One of two automobiles approaching each other on highway cannot lawfully make left turn directly into path of the other, though place of turning is intersection of highways which it reached first, unless the other is sufficiently far away to enable turning automobile to pass in clear, or unless visible signal was given of intention to so turn in time to enable the other to avoid collision.—Webber v. Park Auto Transp. Co., Wash., 244 Pac. 718.

14.——Negligence.—Where defendant's automobile approached curve at excessive speed, and, in rounding it, skidded and struck guy wire 6 feet from road, injuring a guest passenger, evidence supported finding that defendant was negligent, and that his negligence was proximate cause of the injuries.—Nicora v. Cerveri, Nev., 244 Pac. 897.

15.——Use of Streets.—City ordinance under which competitor secured assignment of private cab stand does not deprive rival cab owner of any interest or constitutional right to use streets of city.—Long's Baggage Transfer Co. v. Burford, Va., 132 S. E. 355.

16. **Bankruptcy**—Assignment of Proceeds of Oil. —Where, after filing of involuntary petition in bankruptcy against owner of oil lease, but before adjudication, beneficial development work was done and an assignment of part of proceeds of oil produced, which was in hands of purchaser, was given by owner and state court receiver to claimant, who did the work, held as against trustee, assignment was good, and claimant is entitled to payment.—In re Latex Drilling Co., U. S. D. C., 11 F. (2d) 373.

17.——Attorney's Fee.—Allowance of reasonable attorney's fee to petitioning creditors, under Bankruptcy Act, § 64b (Comp. St. § 9648), is not a matter of discretion, but one of right.—In re Marcuse & Co., U. S. C. C. A., 11 F. (2d) 513.

18.——New Promise to Pay Debt.—**Promise by** debtor, after adjudication in bankruptcy, to pay old debt as soon as he got back into business, is a conditional or contingent promise, which must be accepted by creditor and condition performed to be binding.—Koletsky v. Resnik, Conn., 132 Atl. 898.

19.——Preference.—Where bank, holding notes of insolvent's partnership indorsed by partners, on learning of firm's condition, called on financially responsible partner for payment of notes soon maturing, and partner gave bank his personal note, to be paid in installments, and left proceeds thereof with bank's collection department to be applied on firm's notes held no unlawful preference resulted, though bank may have known that such partner protected himself by taking assets of firm.—Olmstead v. Massachusetts Trust Co., U. S. D. C., 11 F. (2d) 410.

20.——Preference.—Taking of new mortgage from debtor within four months before petition in bankruptcy was filed in lieu of prior ones, which were valid as between mortgagor and mortgagee though improperly acknowledged and not recorded, held not to constitute preferential transfer under Bankruptcy Act, §§ 60a, 60b, 67d (U. S. Comp. St. §§ 9644, 9651).—Wilder v. Colorado Motor Finance Co., Col., 244 Pac. 596.

21.——Transfer to Guarantor.—Transfer to wife of partner in bankrupt partnership of proceeds of sale of notes, when she was liable on her guaranty of husband's and firm debts held not a fraudulent conveyance, even if notes had not previously been set aside for her to secure her liability on guaranty as alleged; payment not being made to a stranger or volunteer.—Peabody v. Burgess, U. S. D. C., 11 F. (2d) 412.

22.——Wife's Interest.—The adjudication of a husband as a bankrupt does not effect his civil death, so as to entitle his wife to be regarded as a widow, within Rev. St. Ind. 1881, §§ 2483, 2491, vested with an interest in his realty adverse to rights of his trustee in bankruptcy.—Taylor v. Voss, U. S. S. C., 46 S. Ct. 462.

23. **Banks and Banking**—Guaranty Fund.—The fact that a bank which holds a certificate as a participant in the bank guaranty system, and which has complied with all the provisions of the Bank Depositors' Guaranty Act, was a persistent and long-continued violator of the general banking law does not deprive its depositors of the protection of the bank depositors' guaranty fund.—Board of Com'rs v. Bone, Kan., 245 Pac. 123.

24.——Guaranty Fund.—Each member bank has an interest in the proper administration of the bank depositors' guaranty fund. Any member bank may maintain a proper action to inquire into waste or illegality in the administraton of such fund; but an issue of that character is not pertinent in a proceeding for mandamus and under the Declaratory Judgment Act, for the interpretation of the Bank Guaranty Law as to the rights and liabilities of parties under a present status of fund.—State v. Bone, Kan., 244 Pac. 852.

25.——Joint Savings Account.—Where a person opens a savings account in a bank to the joint credit of himself and another, payable to either, and balance at death of either payable to survivor, the authority to remain in full force until receipt by the bank from the depositor of written notice of its revocation, and the record shows that the depositor intended to transfer to the person to whom he made the account jointly payable, a present joint interest equal to his own in the account, and the passbook has been left in the possession of the bank for withdrawals by either party on the joint account, a joint interest is created in the right of the depositor in the deposit, and the person to whom the deposit is made payable jointly with the depositor, upon the death of the depositor, without his having revoked the authority to draw, is entitled to the balance of the account.—Cleveland Trust Co. v. Scoble, Ohio, 151 N. E. 373.

26.——Officer of Farm Loan Association.—Under Federal Farm Loan Act (U. S. Comp. St. Supp. 1925, § 9835b et seq.), secretary-treasurer of local farm loan association is not agent of Federal Land Bank making loan, but is public agent, whose authority parties dealing with him in that capacity were bound to know.—Bjorkstam v. Federal Land Bank, Wash., 244 Pac. 981.

27. Paying Depositor's Note.—Bank's payment of depositor's note after receiving instructions to stop payment being unjustified, so that it could not charge payment against depositors' account, it could not counterclaim against depositor for amount of payment on theory of subrogation to payee's rights.—K. & P. Silk Trimming Co. v. Garfield Nat. Bank, N. Y., 215 N. Y. S. 269.

28.——Priority.—Where bank agreed to lend depositor's money on proper security and deposit proceeds to her credit, and bank's cashier loaned himself portion of deposit on inadequate security, money loaned to cashier held not a debt due by the bank as trustee or other fiduciary, and therefore entitled to priority on bank's insolvency, under Banking Act 1919, § 19, class 5.—Campbell v. Morgan County Bank, Ga., 132 S. E. 648.

29. Special Deposit.—Where bank, in letter to plaintiff, informed it it had special fund on deposit to pay for material shipped by plaintiff to depositor, and, plaintiff, relying thereon, shipped material, bank which allowed special fund to be withdrawn contrary to contract could not, on being sued therefor, set up plea of lack of authority of officers to make contract, and ultra vires. — Sears, Roebuck & Co. v. Rouse Banking Co., N. C., 132 S. E. 468.

30. **Bills and Notes**—Conditional Payment for Stock.—Where at time note given in payment of stock in corporation operating chain stores was turned over to transferee bank its cashier had in his possession a letter written by corporation, which stated that all notes and money given for stock would be returned if store was not located in town of maker's residence, letter and note given for payment of stock should be construed as one contract, and hence defense that store was not established was available to maker in suit by bank on note.—People's Bank of Ava v. Rankin, Mo., 282 S. W. 91.

31.——Delay in Presentment.—That holder of check did not deposit same for collection until second day following delivery, and then not in bank on which drawn, which was located in same town held not to preclude recovery on check as against drawer when drawee bank dishonored check and subsequently failed, where there was no showing that any loss was caused by delay in presenting check for payment.—Farmers' Oil & Gas Co. v. Betts, S. D., 208 N. W. 402.

32.——Indorsements.—Under Negotiable Instruments Law, § 68 (Laws 1909, c. 123), an indorser, whose signature appears below that of the payee indorser, is prima facie not liable to the payee, but evidence is admissible to show they have agreed otherwise.—Perley v. Wing, N. H., 133 Atl. 26.

33.——Notarial Paraph on note "ne varietur, in conformity with an act of sale and mortgage of an automobile," held not sufficient to put transferee of note, negotiable in form, on inquiry as to such sale and mortgage.—Ouachita Nat. Bank v. Carpenter, La., 107 So. 896.

34. **Carriers of Goods**—Damage in Transit.—Where inherent infirmity of corn damaged in transit combined with negligence of carrier to cause damage and deterioration of corn, carrier is liable.—Hurley v. Illinois Cent. R. Co., Mo., 282 S. W. 97.

35. **Carriers of Passengers**—Acts of Chauffeurs. —Cab company is liable for acts of chauffeurs when acting as its servants in course of their employment, but is not liable if they are accommodating their friends.—Salomone v. Yellow Taxi Corporation, N. Y., 151 N. E. 442.

36.——Falling Window.—Passenger whose arm was injured from falling window in train cannot recover of carrier, where window was shown not to be defective, and it was not shown who raised window, and it was proven that windows were frequently raised by persons not connected with the train.—Chadwick v. Louisville & N. R. Co., Ky., 281 S. W. 1018.

37.——Negligence.—Where presumption of negligence arises from failure of common carrier to explain how death of passenger occurred, it is for jury to say whether such presumption, which is only prima facie evidence of negligence, entitles plaintiff to verdict, and it is error to direct recovery for plaintiff where no explanation of accident is given.—Salomone v. Yellow Taxi Corporation, N. Y., 151 N. E. 442.

38.——Notice of Arrival at Destination.—It is the duty of a sleeping car company to notify a passenger riding in one of its cars of his or her arrival at destination, notwithstanding it is not a common carrier. A breach of such duty would be negligence, and a passenger aggrieved thereby would be entitled to recover nominal damages. The plaintiff was not entitled, however, to recover of the defendant sleeping car company in this case such damages as the jury by their verdict awarded to her.—Pullman Co. v. Strang, Ga., 132 S. E. 399.

39. **Contracts**—Trust for Infant.—A contract creating trust in favor of child of parties, to be administered by mother, and operating as lien on father's property held not unenforceable because of illegality of consideration, in view of Code 1923, § 8237 et seq.—Wright v. Martin, Ala., 107 So. 818.

40.——Waiver of Delay.—Where subcontract required subcontractor to commence work on June 15th, but, through fault of contractor, subcontractor did not start until July 31st held that subcontractor by then commencing waived fact that it should have commenced on June 15th, and

contractor waived fact that job was not completed on date specified in contract.—Realty Construction Company v. Kennedy, Mich., 208 N. W. 455.

41. **Corporations**—Purposes of Forming.—Section 5301, Comp. St. 1921, specially enumerates the certain purposes for which corporations may be formed. But said section does not expressly authorize the formation of transportation pipe line companies for the purpose of engaging in transportation of oil and gas through pipe lines with the right of eminent domain.—Sneed v. Tippett, Okla., 245 Pac. 40.

42.——Stock Subscriptions. — That corporation failed to carry out its corporate purposes and abandoned its enterprise by leasing its properties held in the nature of acts ultra vires, and no defense to an action by corporation to enforce subscription to its capital stock.—Badger Dairy Co. v. Hansen, Wis., 208 N. W. 477.

43.——"Transacting Business."—Merely bringing suit for merchandise sold is not "transacting business" by foreign corporation, within meaning of Or. L. § 6908, requiring license to transact business before being permitted to sue in state.—Alligator Oil Clothing Co. v. Baseel, Ore., 244 Pac. 661.

44. **Deeds**—Duress.—Where land was conveyed with partial consideration being support of grantors, a reconveyance, procured through duress brought to bear on grantees by Ku Klux Klan, after action had been brought by original grantors to set aside deed, will not be considered in such action.—Pierce v. Garrett, Miss., 107 So. 885.

45. **Electricity**—High Tension Wire.—City held to have power to compel electric light company to protect citizens from danger in bringing high tension wire into city, since franchise of such company, though in perpetuity, was subject to forfeiture for misuser, nonuser, or abandonment. — State v. West Missouri Power Co., Mo., 281 S. W. 709.

46.——Negligence.—Where private tract, over which electric company had right to stretch its wires, was used by public generally for picnicking, and unsigned trespass notice on shack on premises was aimed only against electric company, minor child had right to picnic on land and climb tree over which electric wires causing his death were stretched.—Cooper v. North Coast Power Co., Ore., 244 Pac. 665.

47. **Fraudulent Conveyances**—Bulk Sales Law. —Section 3129 Hemingway's Code (Laws of 1908, c. 100), does not apply to a restaurant being sold, where no merchandise is sold in the transfer of the restaurant.—Carnaggio Bros. v. City of Greenwood, Miss., 108 So. 141.

48.——Mortgage.—Auction sale of land, extensively advertised and fairly conducted, with consent of mortgagee holding overdue mortgage held valid as against rights of insolvent mortgagor's creditors.—McInnis v. McRae, S. C., 132 S. E. 473.

49.——Sale to Partner.—Section 3129, Hemingway's Code (section 1, c. 100, Laws 1908), does not apply to a sale of stock of goods by one partner to another in same business.—Parker v. Tapscott, Miss., 107 So. 561.

50. **Gifts**—Delivery.—Evidence by wife of donee, latter being unable to testify, in view of Rem. Comp. Stat. § 1211, as to delivery by donee's mother of box to her containing nontransferable receipts for transferable securities in bank, together with a paper authorizing bank to deliver securities to donee held not to show delivery, actual or symbolic, of securities or deposit to donee sufficient to constitute a gift thereof.—Vining v. Butler, Wash., 244 Pac. 961.

51. **Highways**—Authority of State Highway Department.—Citizens and taxpayers within county have legal capacity to bring action to enjoin state highway department from constructing proposed hard-surface road, without having alleged special or peculiar damage to themselves.—Gaston v. State Highway Department of South Carolina, S. C., 132 S. E. 680.

52.——Portion Roped Off.—Where portion of public highways has been roped off, individual, who sees fit to use portion, left apparently open, if he fails to use proper care for his own protection, cannot recover for injury; he having duty to take cognizance of dangers which are patent to ordinary person.—Kelly v. Northhampton County Agricultural Society, Pa., 132 Atl. 832.

53. **Husband and Wife**—Antenuptial Agreement. —"Laws of Moses and Israel," within antenuptial agreement, affecting realty in state, made and executed in New York by residents, providing that such laws shall govern property rights of parties, are not "foreign laws," within rules relating to laws governing contracts; "foreign laws" being those of foreign state or nation, which requires people permanently occupying fixed territory, constituting one body politic, with independent sovereignty.—Hurwitz v. Hurwitz, N. Y., 215 N. Y. S. 184.

54.——Imputable Knowledge.—Where owner, to defeat broker's compensation, procured sale of property to a third person, who immediately resold it to broker's customer, and where purchaser was wife of former owner, who was not agent of wife, knowledge he had of contract for commissions between owner and broker, or intention which husband had to defeat collection of broker's compensation, was not imputable to her.—Kerr v. Du Pree, Ga., 132 S. E. 393.

55. **Infants**—Pool Rooms.—Where a statute makes it an offense for the owner to permit persons under a particular age to play at pool in his place of business, and the statute is silent as to the owner's knowledge or intent, the indictment need not allege nor the state's evidence show that he knew the fact.—State v. Furr, W. Va., 132 S. E. 504.

56. **Insurance**—"Accidental Means."—Death of insured, resulting from local administration of novocaine preliminary to operation, because of insured's hypersusceptibility to such drug held death by "accidental means," within double indemnity clause in accident policy for death resulting from bodily injury directly or indirectly.—Mutual Life Ins. Co. v. Dodge, U. S. C. C. A., 11 F. (2d) 486.

57.——Boiler Explosion.—Under boiler explosion policy, defining "explosion" as sudden rupture or collapse of boiler, caused by steam pressure, insurer was liable only for damages directly caused by "rupture" by breaking apart of boiler head, and not for repairs to bag formed thereunder, where no sudden rupture or collapse appeared.—Cleveland Drop Forge Co. v. Travelers' Indemnity Co., Ohio, 151 N. E. 671.

58.——Failure to Issue Policy.—Under either an old line policy or fraternal insurance, right of action for failure to promptly issue, or negligence in due issue of policy or certificate, pursuant to application, is in the insured or her personal representatives, and not in beneficiary named in application.—Royal Neighbors of America v. Fortenberry, Ala., 107 So. 846.

59.——Misrepresentation.—Misrepresentation that insured had never consulted a physician within five years of application of policy held a concealment of material fact by false representation within Comp. Laws Supp. 1922, § 9100 (161), where he had consulted a physician about stomach trouble three months before and had an X-ray of his stomach taken.—Bellestri-Fontana v. New York Life Ins. Co., Mich., 208 N. W. 427.

60.——Refusal to Pay.—Insurer whose defenses were without merit, and who made no tender of part of premium that was unearned if defenses were good held properly assessed penalty for vexatious refusal to pay.—Malo v. Niagara Fire Ins. Co. of New York, Mo., 282 S. W. 78.

61.——Stolen Automobile. — Person purchasing stolen automobile in good faith, using it, securing theft policy thereon, and paying premium, may recover on policy.—Barnett v. London Assur. Corporation, Wash., 245 Pac. 3.

62. **Interstate Commerce**—Abandonment of Railroad.—Under Interstate Commerce Act, § 1, pars. 18-20, as amended by Transportation Act 1920, § 402 (Comp. St. Ann. Supp. 1923, § 8563), Interstate Commerce Commission has power to authorize railroad chartered by a state and engaged in both interstate and intrastate commerce to abandon a branch line located wholly within state, which cannot be operated, except at loss.—State of Colorado v. United States, U. S. S. C., 46 S. Ct. 452.

63.——Repairing Track.—Section hand, whose duties required him to repair and inspect railroad track over which interstate commerce was carried, was engaged in interstate commerce, within federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).—Odell v. St. Louis-San Francisco Ry. Co., Mo., 281 S. W. 456.

64. **Joint-stock Companies and Business Trusts** —Massachusetts Trust.—An agreement and declaration of trust considered and held, although an unincorporated company, it is deemed to be a

"corporation" within the meaning of section 6 of article 12 of the Constitution, since the agreement under which it is organized and operates gives it powers and privileges not possessed by individuals or partnerships, and therefore it could only transact business within the state by conforming to the regulations imposed by statute upon corporations (following Lumber Co. v. State Charter Board, 190 P. 601, 107 Kan. 153).—Weber Engine Co. v. Alter, Kan., 245 Pac. 143.

65. **Landlord and Tenant**—Completion of Purchase.—General rule that tenant cannot question title of landlord pending tenancy does not prevent tenant from showing entire agreement under which he holds, and asserting his rights according thereto.—France v. Ramsey, Ala., 107 So. 816.

66. **Licenses**—Coal Dealers.—Revenue Act 1925, c. 134, § 4, placing privilege tax on coal or coke dealers held application to grocery merchant, selling coal in small quantities as a usual and ordinary incident to his business, in absence of an affirmative showing that dealing in coal has, by generally recognized custom, become a usual and ordinary incident to business of a retail grocery merchant, and a merely local practice cannot control. —Clark v. Killough, Tenn., 282 S. W. 777.

67. **Master and Servant**—Care of Sick Employe. —Severe headache of employe, whom employer undertook to convey home held sufficient notice that her condition might be such as to render unsafe an attempt to travel last 700 feet unaided.—Tullgren v. Amoskeag Mfg. Co., N. H., 133 Atl. 4.

68.——Slippery Floor.—In action for injuries, where waitress testified she slipped on place slippery with refuse, in aisle she was directed to use, and had notified forelady of such condition 30 minutes before accident, evidence held sufficient for jury.—Simmer v. May Department Stores, Mo., 282 S. W. 117.

69.——Warning of Danger.—Where employer knew that use of paint blowgun was dangerous when strong wind was blowing, and purchased masks for employes' protection, negligence of employer in failing to warn or instruct employe, transferred from another department, of such danger, causing employe to contract lead poisoning, resulting in atrophy of optic nerve and loss of vision, was proximate cause of injury.—Atlantic Coast Line R. Co. v. Wheeler, Va., 132 S. E. 517.

70. **Monopolies**—Co-operative Association. — A tobacco growers' co-operative association organized under the Bingham Co-operative Marketing Act of Kentucky, while engaged in carrying out the purposes of that act, is not a trust in restraint of trade, and a contract made between such association and a grower of tobacco is not void as against public policy or in violation of the anti-trust laws of the state of Ohio.—List v. Burley Tobacco Growers' Co-Op. Ass'n, Ohio, 151 N. E. 471.

71. **Municipal Corporations** — Dangerous Street Terminus.—In action for death of one driving automobile into river at street terminus, evidence showing terminus was dangerous, that city had failed to supply device for giving notice of danger, that condition had existed for sufficient time to constitute legal notice to city, and that deceased was exercising reasonable care held to sustain jury verdict against city.—Willis v. City of New Bern, N. C., 132 S. E. 236.

72.——Dangerous Walkway.—Paving contractor, undertaking to provide street crossings and keep them in good condition wherever practicable, was responsible for bad condition of walkway, causing child to fall on nail in board, even if walk was placed there by city.—R. G. Lassiter & Co. v. Grimstead, Va., 132 S. E. 709.

73.——Ice on Sidewalk.—Evidence that icy condition of sidewalk complained of was due to storm five days before the accident, together with disclosed location, use, and opportunity for observation of the situation held to refute city's claim of lack of notice of condition of walk.—Schroeder v. City of Hartford, Conn., 132 Atl. 901.

74.——Zoning Ordinance.—The ordinance in the case at bar, restricting size of buildings, space, and yards, in residence districts, is authorized by chapter 175, Session Laws 1923. It operates equally and alike upon all residents of each district, is not unreasonable or arbitrary, and is clearly within the power granted to the city by the Legislature.—City of Bismarck v. Hughes, N. D., 208 N. W. 711.

75.——Zoning Ordinance.—Under Laws 1925, c. 394, amending General City Law, § 20, subd. 24, zoning ordinance of city of White Plains, prohibiting erection of apartment house for more than 53 families and covering more than 35 per cent of area of plot held valid.—People v. Clarke, N. Y., 215 N. Y. S. 190.

76. **Negligence** — Amusement Park. — Evidence that experience has proved that an instrumentality is sufficient and proper for the purpose for which it is intended is admissible, in action for injuries based on faulty construction thereof, and this may be proved by showing that for a period of time no similar accident has occurred.—O'Leary v. Atlantic Amusement Co., N. Y., 215 N. Y. S. 303.

77.——Merry-go-round.—Failure to inclose cogs, which were open to observation, many feet above seats and rafters of merry-go-round held not negligence, rendering owner liable for injuries to boy climbing to top of machine when in motion, there being no reason to anticipate such action, nor any invitation, express or implied, to do so.—Abbott v. Alabama Power Co., Ala., 107 So. 811.

78. **Principal and Agent**—Injured Fellow Employe.—A person employed as a telephone operator has no authority as agent of the employer to select a surgeon or physician and hospital accommodations for an injured fellow employe.—Gross v. State Industrial Commission, Okla., 245 Pac. 580.

79. **Oil and Gas**—Consideration for Lease.—In an action between rival oil and gas lessees, a demurrer to the petition of the senior lessee was sustained. Part of the stated consideration for the senior lease consisted of the following: Commencing a test well within the county within a year; promise of the grantee to deliver a portion of oil realized from the grantor's land or pay market price for it; promise to deliver gas for domestic purposes, if found; and promise to pay a sum per year, if gas were marketed. The grantee did not promise to commence any test well in the county, or to make any effort to realize oil or find or market gas from the grantor's land, and no detriment to the grantee if he refrained from doing so was manifest held consideration was not disclosed.—Brinkman v. Empire Gas & Fuel Co., Kan., 245 Pac. 107.

80.——Lease.—A lease of land giving the exclusive right to the lessees to drill and operate for oil and gas thereon for a stipulated period and as long thereafter as either gas or oil is produced, for a cash consideration of $1 per acre, and providing that the lessor should have one-eighth of the oil produced and $200 per year for the gas produced from each well, and also gas for the dwelling house of the lessor, and further that a well should be completed within one year from the date of the lease, or if not completed in that time the lessee should pay $1 an acre until completion, held that under the lease there is an implied covenant or condition that there will be reasonable development of the land and the drilling of such number of wells as the circumstances warrant, and as would ordinarily be required on such lands in order to afford protection to the rights of both parties to the lease.—Kan., 244 Pac. 1033.

81.——Terms of Lease.—The lease interpreted, and held notice in writing by the grantor was necessary to terminate the lease for failure to drill a well on the grantor's land within a year, and on receipt of notice the grantee was privileged to elect to keep the lease alive thereafter from year to year by paying an annual rent.—Brinkman v. Empire Gas & Fuel Co., Kan., 245 Pac. 107.

82.——Under Land.—Gas under land is not susceptible of ownership until reduced to possession, and does not belong to owner of land.—Herkness v. Irion, U. S. D. C., 11 F. (2d) 386.

83. **Process**—Jurisdiction.—Where defendant's answer and amended answer in federal court, after removal thereto on state court's refusal to set aside service, set out motion to set aside service and order in state court, and reservation of defendant's rights to object to jurisdiction by state judge, held that this was meant to save question of jurisdiction, and more explicit statement of grounds of motion was not required.—R. H. Hassler, Inc. v. Shaw, U. S. S. C., 46 S. Ct. 479.

84. **Public Utilities**—Rate.—A case where a return of 16.72 per cent to a gas company serving the public on a rate base, offered and accepted by the commission for the purpose of fixing rates, is held not to be confiscatory.—Pittsburg & West Virginia Gas Co. v. Public Service Com'n, W. Va., 132 S. E. 497.

85. **Railroads**—Cattle Gap.—If railroad company maintains stock gap, so as to invite stock to go on it by permitting grass to grow under or over it so as to obscure or conceal the spikes or signals of warning, it is negligent, and liable for injuries to stock going on or over it.—Southern Ry. Co. v. Popejoy, Ala., 107 So. 809.

86.——Negligence.—In action for injuries sustained by plaintiff when struck by something projecting from one of defendant's passenger trains as it passed plaintiff, standing between tracks of defendant engaged in surveying, evidence held sufficient to make a case for jury.—Kelley v. St. Louis-San Francisco Ry. Co., Mo., 282 S. W. 480.

87.——Repairing Bridge.—Under Public Utilities Act, § 58, Commerce Commission may require railroad to repair and maintain bridge and necessary approaches built by it over creek as part of highway approach to railroad crossing, though approaches extend beyond its right of way, "approaches" meaning embankments, grades, or structures of any sort on each side of railroad at crossing, serving as passage or way for approaching crossing.—Henderson County v. Chicago, B. & Q. R. Co., Ill., 151 N. E. 542.

88. **Removal of Causes**—Jurisdiction. — Removal of action from state court, which has no jurisdiction, to federal court, confers no jurisdiction on federal court.—Venner v. Michigan Cent. R. Co., U. S. S. C., 46 S. Ct. 444.

89. **Sales**—Breach of Warranty.—Part payment and the giving of renewal notes by the purchaser for the balance of the purchase price of personal property, with knowledge of a breach of an express warranty contained in the contract of sale, does not constitute a waiver of the breach of warranty. —Pugh v. Hill, Okla., 244 Pac. 1113.

90.——Excess of Contract Requirements.—Where defendant, which had contracted with W. Oil Company for purchase of fuel oil to bunker its ships, at specified prices, secured by fraud and misrepresentation oil in excess of what was necessary as fuel from plaintiff company, which had obligated itself to W. Company to furnish oil to which defendant was entitled, plaintiff, in view of Rev. Civ. Code, arts. 2293, 2294, 2301 (Code Prac. art. 18), had cause of action against defendant for difference between contract price and market price of oil secured in excess of contract requirements.—Standard Oil Co. v. Sugar Products Co., La., 107 So. 566.

91.——"F. O. B. Mine."—In view of Sales Act May 19, 1915 (P. L. 543; Pa. St. 1920, §§ 19649-19726), delivery of coal to carrier pursuant to contract of sale "f. o. b. mine" is in effect delivery to buyer itself, and carrier at once becomes buyer's agent.—New York & Pennsylvania Co. v. Cunard Coal Co., Pa., 132 Atl. 828.

92.——Loss by Fire.—Contract for sale of merchandise, providing that, if goods were lost, they were not to be replaced by seller held to refer only to loss of cargo shipments in transit, and loss by fire while still in seller's possession did not excuse delivery.—Pottash v. Southern Cotton Oil Co., U. S. C. C. A., 11 F. (2d) 529.

93.——Place of Performance.—That technical place of performance of c. i. f. contract was in New York, where shipping documents were to be delivered and payment made held not to preclude basing damages for seller's breach on market price in Baltimore, where rails were to be delivered.— L. B. Foster Co. v. Koppel Industrial Car & E. Co., N. Y., 215 N. Y. S. 214.

94.——Repairman's Lien.—Where one in Massachusetts has valid lien on automobile under conditional sale agreement, lien will be enforced in New Hampshire, though agreement was not recorded. — Baribault v. Robertson & Bennett, N. H., 133 Atl. 21.

95. **Statutes**—Regulation of Electrical Equipment. —Illinois Cities and Villages Act, art. 5, § 1, cl. 100, as amended by Laws 1925, p. 235, and Laws 1925, p. 194, and ordinances enacted thereunder, regulating installation of electrical equipment, and requiring registration of electrical contractors, held violative of Const. U. S. Amend. 14, § 1, and Const. Ill. art. 2, §§ 1, 2, 14, and article 4, § 22, as containing arbitrary and unreasonable classifications. —Berry v. City of Chicago, Ill., 151 N. E. 581.

96. **Street Railroads** — Negligence. — Evidence held to warrant finding that street car motorman's negligence in failing to see 15-year-old boy lying on tracks, where he had fallen when struck by automobile, until car had passed partly over him, was proximate cause of his death.—Skidmore v. City of Seattle, Wash., 244 Pac. 545.

97. **Subrogation** — Volunteer Loan.— Subrogation will arise only where party has paid debt for which he will be liable in event of default, or where he has some interest to protect and advances money under subrogation agreement with debtor or creditor, but agreement with debtor alone will not affect rights of creditor.—Wilson v. Smith, Ky., 281 S. W. 1008.

98. **Taxation**—Moneyed Capital.—Laws 1923, c. 897, taxing moneyed capital competing with business of national banks as authorized by Rev. St. U. S. § 5219, as amended in 1923 (U. S. Comp. St. Supp. 1925, § 9784), held not unconstitutional because property subject to tax depends on action of Congress, since Legislature has power to classify property to be taxed in part by reference to uses in which it is employed, and to make its classification and description flexible to meet conditions thereafter arising.—People v. Goldfogle, N. Y., 151 N. E. 452.

99.——Recording Mortgages.—Ky. St. § 4079a9, taxing privilege of recording mortgages when indebtedness does not mature within 5 years, and exempting mortgages to building and loan associations held not violative of Const. U. S. Amend. 14, Bill of Rights, Ky. § 3, or Const. Ky. §§ 170, 171.—Louisville Gas & Electric Co. v. Shanks., Ky., 281 S. W. 1017.

100. **Telegraphs and Telephones**—Wire in Street. —Telephone company held not guilty of negligence in laying unguarded wire in street preparatory to lifting it to poles, and not liable for injuries to pedestrian who tripped over it.—Arkansas Telephone Co. v. Selis, Ark., 281 S. W. 901.

101. **Time**—Ending on Sunday.—Considering day on which judgment is rendered as first day, bills of exceptions may be signed by court on sixty-first day if sixtieth day falls on Sunday.—Harris v. Sparrow, Va., 132 S. E. 694.

102. **Treaties**—Inheriting Land.—A declaration of war between the parties to a treaty does not of itself suspend or annul a provision therein permitting land in one country to be inherited by a citizen of the other.—State v. Reardon, Kan., 245 Pac. 158.

103. **Trusts**—Reconveyance by Wife's Executor. —Where a husband has purchased land with money of his wife, and has it conveyed to himself, and pays the taxes and makes conveyances of parts thereof, as if owned by him personally, and on the death of his wife is appointed executor of her will, and thereafter continues for a time to deal with the property as his own, and has made no settlement of his executorial accounts, but thereafter, while solvent and not indebted, he conveys the same to a third person and procures the latter to convey the same to him as executor of his deceased wife's estate, such conveyance amounts to a declaration of trust by him in favor of said estate and of the beneficiaries thereof, and if done without actual fraud, becomes binding on him and precludes him and his subsequent creditors from subjecting said land to the payment of his subsequent debts.—Stearns Coal & Lumber Co. v. Jones, W. Va., 132 S. E. 716.

104. **United States**—Lease for Term of Years.— Under Rev. St. § 3732, and section 3679, as amended by Act Feb. 27, 1906, § 3 (Comp. St. §§ 6778, 6884), lease of office space for certain federal agencies for term of years contingent on appropriation for payment of rent was in violation of law, in so far as terms extended beyond year for which appropriation had been made, creating no binding obligation against the United States after the first year, and precluding recovery after premises were vacated in accordance with notice previously given.—Leiter v. United States, U. S. S. C., 46 S. Ct. 477.

105. **Workmen's Compensation**—City Employe.— City employe was working in employer's "plant," within Workmen's Compensation Act, while pouring heated asphalt into expansion joints of concrete pavement of street, and could not sue owner or driver of automobile which ran him down; his remedy being solely against industrial fund.— Shockey v. Royal Baking Powder Mfg. Co., Wash., 244 Pac. 549.